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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 444

STANLEY J. ORLOFF,

Petitioner,

vs.

COLONEL REX E. WILLOUGHBY, COMMANDANT OF FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 195 F. (2d) 209. The opinion of the District Court is reported at 104 F. Supp. 14.

Jurisdiction

The jurisdiction of the Court rests on 28 U. S. Code Section 1254. The petition for a writ of certiorari was granted on November 10, 1952 (R. 51).

Statutes Involved

50 App. U. S. Code, sec. 454(a) provides in part as follows:

> No person, without his consent, shall be inducted for training and service in the Armed Forces or for training in the National Security Training Corps under this title, except as otherwise provided herein, after he has attained the twenty-sixth anniversary of his birth.

Public Law 779, 81st Cong. 2nd Sess. provides in part as follows:

> Notwithstanding any other provision of this title . . ., the President is authorized to require special registration of and, on the basis of requisitions submitted by the Department of Defense and approved by him to make special calls for male persons qualified in needed—
>
> (A) medical and allied specialist categories who have not yet reached the age of fifty at the time of registration, and
>
> (B) dental and allied specialist categories who have not yet reached the age of fifty at the time of registration.
>
> Persons called hereunder shall be liable for induction for not to exceed twenty-four months of service in the Armed Forces.

This portion of the statute appears in the U. S. Code as 50 App. U. S. Code, sec. 454 (i)(1).

Statement of the Case

The petitioner, Dr. Stanley J. Orloff, is a private in the United States Army. He is married and has two children. He holds a degree of doctor of medicine and is duly licensed to practice medicine in the States of Louisiana and New York. Prior to his induction into the United States Army,

he was actively engaged in the practice of medicine, specializing in psychiatry at Creedmor State Hospital, New York City, New York. He was also engaged in psychobiologic studies for the Institute for Psychobiologic Studies, New York Department of Mental Hygiene (R. 2, 23, 32-34).

The petitioner was inducted into the Army on July 26, 19 , after he had passed his twenty-seventh birthday. Although over the twenty-six year age limit for the regular draft, 50 App. U. S. Code, sec. 454 (a), the petitioner was drafted in accordance with the provisions of 50 App. U. S. Code, sec. 454(i)(1), which authorizes the drafting of medical doctors who are under the age of fifty (R. 2, 5-6, 22-23). On July 5, 1951, prior to petitioner's induction as a private, he had been granted a commission as a Captain in the Medical Corps, U. S. Air Force, but this commission was revoked on July 24, two days prior to his induction (R. 11, 30-1).

The regulations and practice of the United States Army provide that an individual can serve as a doctor of medicine in the United States Army only if he holds a rank as a commissioned officer (R. 2, 8-9, 23-24). Subsequent to his induction, petitioner applied for a commission, so that he might be employed as a doctor in the army in accordance with the provisions of the statute under which he was inducted (R. 2, 23-24). The petitioner completed the application form for commission including a required loyalty certificate. The form required a statement as to petitioner's membership, association or connection in any manner with any of the listed organizations designated by the Attorney General pursuant to Executive Order 9835. (see *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123). Petitioner answered that he had attended meetings or classes of certain of the organizations listed, but claimed his federal constitutional privilege as provided for in the form with regard to his connection with other

organizations. He concluded his statement as follows: "However, I have never considered myself an organizational member of any of the aforesaid." (Exh. 2, pp. 10-12).

Petitioner was finally advised that it might take from six months to a year before the application for a commission could finally be acted upon. He thereupon requested a discharge while the Army had his application for a commission under consideration, but this request was denied (R. 3, 13). Subsequent to the hearing in the District Court, his application for a commission was formally denied by the Army.

Petitioner was classified by the Army ("potential military occupation specialty") as a medical laboratory technician (R. 6.) This classification does not require or utilize any of the petitioner's training and experience as a doctor; men with no previous training or experience of any kind are assigned to this classification after approximately two to three months training in the army. Petitioner had himself, prior to being assigned to this classification, received the same training in preparation for it as was usually given to a high school graduate (R. 34-39).

Petitioner, contending that his retention in the army under these circumstances was unauthorized and in violation of the applicable provisions of the Selective Service Act, sought to obtain his release from the army by writ of habeas corpus.

Petitioner first filed a petition for a writ in the United States District Court for the District of Columbia. The petition, however, was dismissed for lack of jurisdiction. *Orloff* v. *Lovett*, 101 F. Supp. 750. The petitioner was then transferred to Fort Lawton, Seattle, where he instituted the present action (R. 6-7).

After a hearing upon the merits, the District Court denied the writ. The District Court held that although the petitioner had been drafted under a special provision authorizing his induction solely because he was a doctor, his status

was the same as any other inductee. The District Court said: "Therefore, as the Court interprets the law, a doctor inducted under the statute applicable is in the service in the same status as he would be had he been inducted under other applicable statutes, and whether he is used in a medical category or not." 104 F. Supp. at 16. The District Court added that it saw no constitutional objection to this construction of the statute.

On appeal, the Court of Appeals affirmed the District Court, but its reasoning was different. The majority of the Court found that the petitioner "is not being utilized in a capacity wholly outside the medical field." It held that the act drafting doctors solely because they were doctors and admittedly for that purpose "did not make mandatory, use of the inductees strictly in their professional capacities," and concluded that the petitioner "having been given a duty assignment within what we find to be the minimal permissible area, we are without power to control the exercise of military discretion." 195 F. (2d) at 211.

Judge Goodman originally concurred in the decision of the Court of Appeals on the mistaken view that petitioner's failure to obtain a commission was due to his refusal to comply with regulations. He specifically disagreed, however, with the reasoning of the majority, stating as follows:

> In my opinion, Congress did not leave to the military the power to fix the duties of a drafted doctor within some general undefined limits. For if that be so, then a drafted doctor, for example, could be put to work by the military, cleaning sponges or instruments in an operating room, upon the theory that such work has a reasonable relationship, within a 'permissible area,' to medical services (195 F. (2d) at 213).

On petition for rehearing Judge Goodman changed his concurrence to a dissent, stating that "due process under the 'Doctors Draft Law' requires the Army to use appellant

as a doctor or return him to civilian life." 195 F. (2d) at 213.

Upon application by petitioner, Mr. Justice Douglas, in order to protect the jurisdiction of this Court on review, granted a stay against the removal of petitioner from the control and custody of the respondent pending the timely filing and disposition of the petition for certiorari. Subsequently, upon the application and representation of the government that the respondent herein would maintain his control and custody of the petitioner, Mr. Justice Douglas modified this stay order to permit the petitioner's assignment anywhere within the United States provided that respondent's control and custody of the petitioner would not be disturbed.

Specification of Errors

The court below erred in affirming the judgment of the trial court because:

(1) The statute which authorized the petitioner's induction into the armed services requires that the petitioner be utilized as a doctor.

(2) The record shows that petitioner is not being utilized as a doctor, as required by the statute which authorized his induction.

(3) The statute as construed and applied by the courts below constitutes an unreasonable discrimination against doctors as a class, in conflict with the Fifth Amendment.

(4) Upon the record and the law the petitioner is entitled to an order discharging him from the Army.

ARGUMENT

I. *The Issue in the Case*

The statute which furnishes authorization for the induction of the petitioner, Title 50 App. U. S. Code, Sec. 454 (i)(1), is by its terms an exception to the general provisions

of the draft act. It authorizes the President to "Notwithstanding any other provision of this title . . . require special registration of and, on the basis of requisitions submitted by the Department of Defense and approved by him, to make special calls for male persons qualified in needed . . . medical and allied specialist categories who have not yet reached the age of fifty at the time of registration . . ."

There is no question that apart from this exceptional statute, the petitioner was over age and not subject to the draft. Nor is there any question that he was subject to the provisions of this statute because he held a degree as a doctor of medicine, and that in the absence of such a qualification, he was not required to register under the statute.[1]

In our view, the authorization furnished by the statute permits the induction into the armed services of only those doctors or other medical or allied specialists whom the armed services need and utilize in their specialist categories. In other words, the authorization goes no further than the justification in terms of need. Simple common sense dictates that Congress did not authorize the armed services to go outside the regular age limits set by the draft in order to induct doctors so that these doctors might serve as infantrymen or company clerks or laboratory technicians or whatever else might come to mind.

Accordingly, if the armed services do not need, or for one reason or another do not choose to utilize, the services of a doctor drafted under this statute, it cannot thereupon determine to use him in some other capacity. The special authorization which empowered the armed services to take him from civilian life has ceased, and he must be released. The situation is no different than if the armed services retained a particular individual in the service without his consent beyond the time limit authorized by statute.

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[1] See Presidential Proclamation No. 2906, October 6, 1950, 15 F.R. 6845, and No. 2915, December 28, 1950, 15 F.R. 9469.

This interpretation, which is the only rational one that can be made of the statute, is fully borne out by the language of the statute, its purpose and legislative history,[2] the regulations issued to implement the statute, and its position in the overall statutory scheme.

II. *The Purpose of the Statute*

The statute here under consideration was made necessary by the nature of the existing draft program. The age limit in the present draft law, unlike that in the previous draft, is set at the low figure of twenty-six. With so low an age limit, the draft obviously could not bring into the service persons in certain needed specialist categories who, because of the years of training required to attain certain skills, would inevitably have reached an age above the twenty-six year limit. The clearest example of this class is doctors of medicine, relatively few of whom would fall under the age of twenty-six. Unquestionably, the armed services could not function properly without an adequate supply of physicians. As a result, the armed services found it necessary to make extensive calls on those doctors who had served in the last war and remained in the Reserves. But Congress believed it unfair to require those who had served once to serve again while others who had not served at all were still available. The present statute was enacted to meet this problem by authorizing the induction of doctors who are under the age of fifty.

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[2] The relevant legislative materials are: Hearings before Committee on Armed Services of the House of Representatives on H. R. 9554, No. 210, 81st Cong. 2d Sess.; Hearings before a Subcommittee of the Committee on Armed Services of the United States Senate on S. 4029, 81st Cong., 2d Sess.; H. Rep. 3015, 81st Cong., 2d Sess.; S. Rep. 2449, 81st Cong., 2d Sess.; H. Rep. 3039, 81st Cong., 2d Sess.; 96 Cong. Rec. 13855 to 13870, 81st Cong., 2d Sess. (House debate); 96 Cong. Rec. 13707 to 13712, 81st Cong., 2d Sess. (Senate debate).

Thus H. Rep. 3015, 81st Cong., 2nd Sess. p. 2, stated:

> The purpose of the bill is to provide the necessary authorizations through which the Armed Forces can meet the demands being made for additional personnel in the medical, dental, and allied categories to support the expanding forces without requiring the large-scale call to active duty without their consent of Reserve Officers who have had substantial periods of service in World War II.

The objectives and purposes of the statute and an analysis of its provisions are set out most fully in the statement on the bill made to the House of Representatives by Congressman Vinson, Chairman of the House Committee on the Armed Services (96 Cong. Rec., 13856-13857):

> . . . Mr. Chairman, the Army, Navy, and Air Force have a pool of 30,000 physicians and 12,000 dentists in their Reserve components who can be called to active duty.
>
> The problem here is to provide a fair and orderly system of priorities under which medical, dental, and related personnel will enter military service.
>
> It is in the best American tradition of fair play that those who have rendered little or no service, and who are otherwise qualified, should be the first to serve. There are a number of doctors and dentists who have given no service at any time. On the other hand, the vast majority of doctors and dentists now on the Reserve rolls have already served their country faithfully and with distinction.
>
> In an endeavor to furnish a more satisfactory solution to the problem, the bill now under consideration was introduced, which proposes to amend the Selective Service Act of 1948 in this regard.
>
> The bill authorizes the President to require the special registration of all male medical, dental, and allied specialist categories under the age of 45.[3] It

[3] The bill was amended, before final passage, to set the age limit at 50.

authorizes the induction of qualified individuals from this group and makes them liable for military service for a period not to exceed 21 months . . .[4]

Under the present provisions of Public Law 351, Eighty-first Congress, the Career Compensation Act, physicians and dentists who volunteer for active duty with the Armed Forces or the United States Public Health Service receive an additional $100 a month. Because of the wording of this legislation the Reserve officers and National Guard officers receiving orders to accompany their units on active duty are not eligible to receive the additional pay. This is indeed unjust. The bill, therefore, has been amended so as to permit these officers to qualify for such additional benefits, but persons inducted under the authority of the proposed legislation will not be entitled to the extra pay.

In order that the talent available to the Armed Forces in the fields of medicine, dentistry, and the allied sciences may be distributed efficiently among the three military services, the Secretary of Defense may now detail such personnel between the three services as required. Officers so detailed often desire to further their careers in the service to which detailed. The bill, therefore, authorizes the Secretary of Defense to effect these transfers under the following conditions: The individual officer must request the transfer himself; both the service from which he is to be transferred, and the service he is to enter must concur. Provisions are made for protecting the promotion, seniority, retirement, and leave rights and benefits of officers who are transferred under this authority.

I think that all Members of the House will agree that the comprehensive treatment which the bill gives to this important subject furnishes a satisfactory basis upon which the Congress can enact sound legislation.

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[4] The statute was amended in 1951 to extend the period of service to 24 months.

> To sum up, we now have 6,226 doctors and 2,358 dentists on active duty in the armed services. By July 1, 1951, we will need a total of 11,250 doctors, and 5,000 dentists.
>
> Thus, it is our belief that this legislation will provide the means by which the armed services will obtain 5,000 more doctors and 2,650 more dentists.

Again and again throughout the hearings and the debates in Congress, Congress indicated that the purpose and intent of the statute was that doctors drafted thereunder be utilized as doctors and nothing else. A failure to carry out this purpose was described as an unwarranted invasion of the rights of doctors as well as an unnecessary injury to the civilian population which would be deprived of the doctor's services.

The same theme that doctors be utilized solely as doctors and that none be removed from the ability to serve civilians unless absolutely necessary for the armed services was stressed in the Congressional hearings by the representatives of the armed services who were the sponsors and proponents of the legislation, by other government officials, and by representatives of interested organizations such as the American Medical Association. The members of the Committees holding the hearings invariably shared these views.

Thus in the House hearings, during the testimony of John G. Adams, Assistant General Counsel, Office of the Secretary of Defense, Congressman Vinson said: "It is highly important that there be a National Advisory Committee, as a means of extending this down into towns, so that the civilian population can be served with doctors as well as the armed services" (7148-7149).

A prepared statement of Major General Raymond W. Bliss, the Surgeon General, United States Army, presented to both the House and Senate Committees, emphasized that the purpose of the statute was "to insure that our soldiers,

sailors, and airmen are given adequate medical care without, however, depriving our civilian population of a single physician or dentist who is not required in the active support of the military force of this Nation." (House Hearings, 7151; Senate Hearings, 47).

The following colloquy occurred during the testimony of Brigadier General Robinson, who appeared for the Surgeon General of the Army:

> Mr. Gavin: I would like to ask a question as to whether they expect to use the doctors to doctor or whether they will do a lot of paper work and take up their time with a lot of unnecessary things. Are they going to confine them to handling patients?
>
> General Robinson: We have worked strenuously since the war on a development of a Medical Corps to do the functions that the doctors should be doing.
>
> Mr. Gavin: To let the doctors do the doctoring?
>
> General Robinson: To let the doctors do the doctoring; yes, sir. (House Hearings, 7164.)

This same point was stressed again during the testimony of Dr. Richard L. Mieling, Director of Medical Services, Office of the Secretary of Defense:

> Mr. Kilday: Is it the purpose of the Department of Defense to adopt any regulation or policy that will see to it that the medical personnel are used for medical purposes and that the supply of doctors is conserved?
>
> Dr. Mieling: Yes. The Secretary of Defense has taken very active steps to assure that. (*Id.*, 7174.)
>
> * * * * * * *
>
> Mr. Kilday: Now, on the matter of the assignment of medical personnel to medical duty—a Member was showing me a letter that he received from one of his constituents, a doctor, who served in the last war, and he said that he had spent no more than 10 percent of his time in the service on medical duty. The balance of his time had been spent on boards, courts martial,

and administrative duty. Will there be a concentrated effort to put men from the medical service on jobs which do not require the professional training and skill of doctors and dentists?

Dr. Mieling: It is the policy of the Department of Defense that this shall be done, and, with that in mind, it is the policy of the Secretary of Defense that we will review the requirements and requests for the call up of medical officers in an attempt to increase the size of the medical service board to take care of these nonprofessional duties. (*Id.*, 7176.)

Dr. Walter B. Martin, testifying for the American Medical Association, endorsed the bill, but only on the assumption that doctors drafted under the bill would be utilized as doctors, a view that was shared by the Chairman of the Committee. Thus:

Dr. Martin: This bill provides a discriminatory call-up of physicians beyond the present draft age due to the special needs of the Armed Forces in the present national emergency that cannot be met otherwise. The American Medical Association supports this step but, at the same time, expects that the physicians who are required to serve will be assigned to duties which are essential to the war effort.

* * * * * * *

The Chairman: That is a very fine conclusion, and no doctor drafted should be assigned to do work that is not essential to the war effort. There are no two ways in the world about that. We should not put them in there just to be putting them in there to do something that has no direct bearing on the medical care of the men or their physical welfare.

Dr. Martin: Yes. We are accepting a discriminatory law, and we feel that we should be protected. (*Id.*, 7193).[5]

[5] Dr. Martin made the same point in his testimony before the Senate Committee (at p. 12).

During the hearings on the Senate side, Senator Gurney, o had introduced the bill in the Senate described its pur-se as follows:

> I feel that this bill does recognize the dual responsibility of Congress, first, in providing doctors for the military and, second, for keeping the necessary doctors for the civilian communities. (Senate Hearings, 15.)

The same theme was stressed in the debate on the House or.

> Mr. Scrivner: I find there is some misgiving in the minds of some Members as to the justice of picking out a certain class or a certain group of professional men to be taken in. I have received many letters from my boys and they are just as fine as any to be found anywhere. I am sure the chairman can say a few words of reassurance in the problem they present. It is this: During World War II there were skilled men, many specialists who were confined to merely routine desk jobs. They want to feel sure that if these men are taken in that their skill in their profession will be used and that their time will not be wasted warming a chair. Was that question gone into?
>
> Mr. Vinson: That was discussed yesterday, and we had the assurance of the medical corps heads that when they call doctors they are going to be used for their professional qualifications.
>
> Mr. Scrivner: I am glad to have that assurance.
>
> Mr. Short: Mr. Chairman, will the gentleman yield?
>
> Mr. Vinson: I yield.
>
> Mr. Short: I am very happy that the gentleman from Kansas asked that question, because we all know there were grave abuses in the last world war. The gentleman from Texas [Mr. Kilday], chairman of the subcommittee, found a lot of doctors sitting out in the desert doing nothing when we had an acute shortage of them back home. They were doing housekeeping work, administrative work, and so forth. We have been assured that that mistake will not be repeated.

Mr, Vinson: The gentleman is correct. (96 Cong. Rec. 13857.)

* * * * * * * *

Mr. Judd: Why should they require 4.5 doctors per thousand men?

Mr. Vinson: Because the people who administer the law and who have charge of the health of the armed services estimate that is what they need. I do not know whether it is right or wrong, and I do not think any of us is in a position to say it is too high or too low. All we want to do is to see that every man that is brought into the medical service performs the duties for which he is brought in, and that the medical force of the armed services is not overstaffed. (*Id.* 13859.)

III. *The Statute's Language and Method of Operation*

That the intent and purpose of the statute was that doctors inducted thereunder be utilized as doctors is shown further by the manner of operation of the statute and its specific language.

The statute by its terms provides for the specific registration of, and induction on the basis of requisitions submitted by the Department of Defense of, "male persons *qualified* in *needed* . . . medical and allied specialist categories." In contrast to all other persons subject to the regular draft, who are inducted for "training and service," doctors inducted under the doctors draft are inducted only for "service." Thus it is perfectly apparent that doctors are to be inducted only when needed to serve as doctors, and that they are to be inducted solely for "service" as doctors. By omitting the word "training" from the authorization for persons inducted under this statute, Congress clearly expressed its intent that doctors would immediately go to work as doctors, and it expressly denied to the armed services any authorization to train doctors inducted under this statute to

serve in any other capacity. With this in mind, Congress expressed its intention that doctors inducted under this statute would become commissioned officers in the Medical Corps of one of the services so that they would then be able, under military regulations, to function as doctors. At the hearings, representatives of the armed services testified that any doctor who had not been commissioned prior to his induction would be commissioned immediately thereafter. This was expressed most clearly in the testimony of Brig. Gen. Robinson before the House Committee.

Mr. Kilday: You propose to commission these men after they have been drafted?

General Robinson: Yes Sir.

Mr. Kilday: Of course you cannot draft him in a commission status?

General Robinson: That is correct.

Mr. Kilday: After he has been drafted, if he waits that long, he will be commissioned. I assume you do not expect to have to use the draft if you get it.

General Robinson: That is correct.

Mr. Kilday: If he does wait to be drafted he would come in as a private?

General Robinson: That is correct.

Mr. Kilday: And he would be immediately tendered a commission?

General Robinson: We would tender a commission to him. It could be done, provided he would accept it.

Mr. Kilday: If he would not accept it he would remain on as an enlisted man?

General Robinson: That is correct.

Mr. Kilday: If he would accept it it would be tendered to him?

General Robinson: Yes, sir. (House Hearings, 7164.)

* * * * * * *

Mr. Kilday: On that point, at what grade will you commission these men?

General Robinson: We have a regulation that pre-

scribes what their grade will be, in accordance with their experience.

Mr. Kilday: What is the lowest grade?

General Robinson: First lieutenant.

Mr. Kilday: First lieutenant?

General Robinson: Yes, sir.

Mr. Kilday: He is going to be drafted. He is going to be immediately tendered a commission, and not as a second lieutenant, but as a first lieutenant.

General Robinson: That is correct. (House Hearings, 7166-7167.)

Members of Congress assumed as a matter of course that doctors drafted under the bill would immediately or shortly after their induction be commissioned in the Medical Corps of one of the armed services. However, Congress did not wish doctors inducted under the bill to receive a special pay of $100 a month, which it had previously provided for commissioned officers in the Medical and Dental Corps of any of the armed services. Title 37 U. S. Code sec. 234. For this reason it inserted in the bill before it section 5, which provides that "No person inducted under the provisions of this act shall be entitled to the benefits of section 234 of this title."[6] By definition, this special pay is granted only to commissioned officers in the Medical and Dental Corps. By denying this special pay to those inducted under the statute, Congress clearly indicated its intention and understanding that doctors inducted under the statute would become commissioned officers in the Medical Corps of one of the armed services. This was clearly stated in the hearings before the House Committee.

Mr. Blandford: May I explain one thing to the committee, which I think should be cleared up with the departments at this point. If you induct a man, you induct him as a private. Now if you induct a doctor as

[6] This provision appears in the U.S. Code as Title 37 sec. 234 b.

a private, is it the intention of the departments to immediately commission that man following his induction?

Mr. Kilday: It was so testified yesterday.

Mr. Blandford: Because the law requires that, in order for a man to be entitled to $100, he must be a commissioned officer and it does not apply to enlisted personnel. (House Hearings, 7223.)

See also H. Rep. 3015 on H.R. 9554, 81st Cong. 2nd Sess., at page 5, and the debate in the Senate, 96 Cong. Rec. 13711, 81st Cong. 2nd Sess.

The purpose of section 5 of the Act was to deny to those who were inducted under the act the extra compensation of $100 a month, Congress believing that this extra compensation should be reserved for those who volunteered. Thus, in the debate in the House, representatives of the Armed Services Committee stated as follows:

> Mr. Vinson: Let me say that we are hoping when this bill passes it will not be necessary to draft any doctors. We hope they will volunteer and join the reserves. We say to you, 'If you volunteer and join the reserves then you get the extra pay of $100' which the Career Compensation Act gives to doctors. (96 Cong. Rec. 13857-8.)
>
> . . . . . .
>
> Mr. Kilday: . . . . The provision of the Career Compensation Act, which grants $100 a month additional pay to doctors who volunteer for service, will be a sufficient incentive together with the provision that if a man waits until he is drafted, he is not going to get that additional compensation. I regard that as completely just and basically necessary in legislation of this type. (96 Cong. Rec. 13862.)

It is perfectly evident, however, that this discrimination in pay was the only discrimination intended by Congress between doctors who volunteer and doctors who are inducted under this act. To interpret the act so as to permit a further

discrimination, and to authorize the armed services to keep inducted doctors in an enlisted status and not employ them as doctors—which is the situation in the present case—is a clear violation of the statute.

Section 3[7] of the statute carries out the same scheme. This section provides in pertinent part as follows:

> ". . . the Secretary of Defense . . . is authorized to transfer between the armed services, within the authorized commissioned strength of the respective services, officers holding commissions in the medical services or corps, including the reserve components thereof . . ."

Enactment of this provision as part of the doctors draft law further evinced the Congressional intent and assumption that all inducted doctors would become commissioned officers.[8]

The fact that under the scheme of the statute and the representations of the military, doctors to be drafted under the statute were to be commissioned at a rank in accordance with their age and experience was an essential consideration in inducing Congress to pass the statute. Congress frankly recognized that the statute was discriminatory in nature and could be justified only in terms of the need for doctors and the fact that doctors to be inducted would be given special privileges. This is seen in the testimony of Dr. Martin of the American Medical Association, quoted supra at page 13, and even more clearly from the following discussions on the floor of the House.

> Mr. Kilday: The fact that this is discriminatory legislation is frankly admitted by the committee. It singles out one profession, and its allied professions,

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[7] This section appears in the U.S. Code as 5 U.S.C. sec. 171a(g).

[8] The Congressional intent and assumption that all inducted doctors would become commissioned officers is also evident in the House Hearings at pp. 7165, 7167, 7189, and in the Senate Hearings at pp. 40-41.

and provides for their induction into the service where others of their own age group are not inducted. I think it should be stated that the American Medical Association and the other associations affected by the bill have endorsed it. They recognize the need for medical service to the extent they are willing to accept this discriminatory legislation in the public interest.

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Mr. Clemente: As an added inducement, is it not a fact when doctors are called into the armed services they are given at least a first lieutenant's grade?

Mr. Kilday: That is correct. I point out the fact that it is discriminatory, because when you come to try to explain the provisions of this bill as other provisions of law may affect other groups, you cannot reason this out on a logical basis, because this is an individual group that is picked out of the population, subjected to special obligations and services, and entitled to certain privileges and advantages. (96 Cong. Rec. 13861.)

The discrimination is heightened by the fact that the petitioner in this case is married and has two children. If he were subject to the provisions of the regular draft, he would be deferred under the provisions of Title 32 C. F. R. 1622.30, which provides for the deferment of ordinary registrants with children. Congress was undoubtedly aware that older men would have family responsibilities to a much greater extent than men under 26. It was also aware that the whole doctors draft would be defeated if deferments were allowed to all men with children. But this problem was obviated in Congress' mind by the fact that the military had assured Congress that doctors would receive a commissioned rank according to their age and experience[9] and thus undoubtedly be able to discharge their family responsibilities. It is inconceivable that, in

[9] E.g.: "General Robinson—We have a regulation by which we commission in grade in accordance with certain provisions, and one of those provisions is the experience and the training that the man has." (House Hearings, 7167).

the absence of such an understanding, Congress would have authorized doctors to be discriminated against because of age, and in addition to be denied deferments because of dependencies which are granted to younger men.

IV. *The Regulations Implementing the Statute*

The regulations of the Selective Service Administration are designed to the same end. A separate set of regulations were promulgated to cover individuals who fall within the scope of this statute. 32 C. F. R. 1650 ff. Persons covered by the statute and required to register by Presidential Proclamation [10] are at the time of registration required to fill out forms entitled "Initial Data for Classification and Commissioning in Medical Services for Medical, Dental and Veterinary Corps." 32 C. F. R. 1650.8(c). This data is to be forwarded to the armed forces for their consideration. Thereafter registrants are not to be inducted unless they have been "found acceptable for service in the armed forces." 32 C. F. R. 1650.40 to 1650.44. Acceptability in the armed services is to be evidenced by a Certificate of Acceptability (D.D. Form No. 62). The regulations provide that this certificate "for each special registrant who is found acceptable for service in the armed forces will show the *specialist category in which the armed forces will accept him for service.*" [11] 32 C. F. R. 1650.30(f). Thus the regulations carrying out the scheme of the statute provide specifically for induction for service in a specialist category.

V. *The Opinion Below*

The court below recognized the intent and purpose of the statute to bring doctors into the armed services to serve as doctors in the following words: (195 F. (2d) at 210-211):

> That the primary purpose of drafting doctors, not otherwise subject to induction, was to supply the armed

[10] See fn. 1, supra.
[11] Emphasis supplied.

forces with needed specialists in this category, is apparent. Certainly, that was the ground on which the bill was justified to Congress by the military. And it also seems apparent that Congress contemplated that inductees under the Act would normally be utilized in their professional capacities. A reading of the debates in Congress is replete with references to such a congressional understanding and desire. See 96 Cong. Rec. 13857, 13859.

Although thus recognizing the clear intent of Congress and the purpose and policy of the statute, the court below chose to ignore this intent and the purpose of the statute on the ground that Congress had not expressly stated the limitation, inherent in the statute, requiring the armed services to utilize doctors drafted under the Doctors Draft Law as doctors. Admittedly there is no language in the statute expressly authorizing the armed services to use doctors in any other capacity. But the court below apparently found such authorization in the fact that the military assured Congress that doctors drafted under the law would be employed as doctors, and that these assurances were necessary to secure enactment of the bill. See 195 F. (2d) at 211, where the court below makes reference to pp. 7164, 7174, and 7176 of the House Hearings, *supra*, and to the debate reported at 96 Cong. Rec. 13857. Thus, from the fact that Congress accepted the assurances of the military that it would use doctors drafted under the law only as doctors, the lower court finds an authorization to the armed services to employ them in some other capacity.

Such a statutory construction is obviously irrational, in the absence of some justification in terms of the purpose and policy of the statute. None is offered, with the exception of the suggestion that the armed services should have power to deal with the situation of an inducted doctor who refuses a commission and thus attempts to escape service

entirely. (195 F. (2d) at 212; see Hearings before House Committee, supra at 7164.) But petitioner clearly does not fall in this category. The suggestion by the court below that the revocation of petitioner's commission by the Air Force prior to his induction puts him in a different category (195 F. (2d) at 212) is clearly inapposite. There is no question that, whatever may have occurred prior to his induction, petitioner did, subsequent to induction, clearly indicate his willingness and desire to accept a commission, complied with all regulations, and did everything that he could to obtain such a commission.

The Court of Appeals, troubled by its own reasoning and the constitutional problems raised thereby, refused to follow its reasoning to the logical conclusion that there was no limitation at all upon the use of doctors drafted under the statute, a conclusion which was urged by respondent and reached by the District Court. The court accordingly found that there was an implied limitation in the statute which restricted the Army to utilizing the petitioner within a "minimal permissible area" not "wholly outside the medical field." (195 F. (2d) at 209.)

But this concession on the part of the court only demonstrates the invalidity of its holding. For it constitutes a recognition by the court that the statute, in authorizing a special draft of doctors, can be justified only if, after induction, the professional skill of the doctor is utilized as such, and that this is a limitation inherent in the statute itself. But working as a laboratory technician or, as Judge Goodman put it, "cleaning sponges or instruments in an operating room" (195 F. (2d) at 213), although perhaps not "wholly outside the medical field," does not require or utilize a doctor's professional skill. Thus the lower court realized that the statute could only be interpreted as imposing a limitation on the manner in which the Army could utilize the petitioner. But it irrationally rejected the

Army. Accordingly, the Army has no authority to keep him in the service and must discharge him.

Conclusion

Since the Army refuses to employ the petitioner as a doctor, it has no authority to keep him under the provisions of Title 50 App. U. S. Code sec. 454(i)(1). Since he does not fall within the provisions of this section of the draft act, his retention in the service is a clear violation of Title 50 App. U. S. Code sec. 454(a), which specifically prohibits the induction of any person after he has passed the twenty-sixth anniversary of his birth.

The judgment of the lower court should be reversed and the case should be remanded to the District Court with instructions that the Army be ordered to discharge the petitioner.

Respectfully submitted,

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